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CIMB Bank Bhd v Lim Seng @ Lam Ngan & Ors

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HIGH COURT (KUALA LUMPUR) — SUIT NO D-22–1462 OF 2008
LEE SWEE SENG JC
10 NOVEMBER 2011

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Banking — Securities for advances — Sale of — Whether any impropriety in sale of securities — Whether defendants knew of auction of securities — Whether notice of auction required to be given under loan agreement cum assignment — Whether defendants took steps to challenge propriety of auction if aggrieved

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Pursuant to two suits, filed in the year 2008 and in 2011, and which were heard together by the court, the plaintiff claimed against the defendants for amounts outstanding under, respectively, a term loan and a fixed loan, after the properties that secured both facilities had been sold arising from the defendants' failure to make instalment payments as agreed. The defendants

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counterclaimed in both suits for damages for wrongful and invalid sale of the properties and prayed for the return of the estimated value of the properties. The auction in the 2008 suit resulted in a surplus of RM22,652.20 over the amount owing to the plaintiff. The plaintiff did not credit the defendants' account with the sum but kept it in a suspense account because of the

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defendants' default on the fixed loan facility. The defendants alleged the plaintiff had, by a revised offer letter of settlement dated 5 December 2006, consolidated both the term and fixed loans and substituted or varied the terms and conditions of the original facility agreements. The plaintiff denied this was so and said the without-prejudice combination of the two facilities was to make

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it easier for the defendants to settle their dues and that it was made clear to the defendants that if they defaulted on the consolidated scheme, the plaintiff was entitled to exercise its full rights and remedies under the original agreements that bound each facility.

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Held, granting judgment with costs in the 2011 suit and dismissing the counterclaims in both suits with costs:

(1) It was made amply clear to the defendants that if they did not make the revised instalment payments on the revised dates due, the plaintiff would

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revert to enforce its full rights under the original agreements and the letter of offer (see para 14).

(2) It was obvious the defendants were aware of the public auction of the Rawang property (that secured the fixed loan) and that the sale had been completed before the settlement proposal dated 5 December 2006. In

any event, by cl 14 of the loan agreement cum assignment, there was no requirement for the defendants to be notified of the auction (see paras 21–22).

(3) Even if notice had not been formally served, it was not fatal. Under cll 13 and 14(b) of the loan agreement cum assignment, upon the defendants' default the whole amount of the loan and interest became immediately due and repayable and the plaintiff had the right and power to sell and assign the property as the absolute unencumbered owner thereof (see para 26).

(4) The defendants were barred from raising the validity of the auction of the Selayang property as they took no action to challenge the decision of the land administrator in the manner provided by s 418 of the National Land Code (see paras 37–38).

(5) In the absence of any manifest error being shown, the defendants were bound by the plaintiff's certificate of indebtedness in exh P15 (see para 37).

[Bahasa Malaysia summary

Merujuk kepada kedua-dua guaman, yang difailkan dalam tahun 2008 dan 2011, dan yang mana telah didengarkan bersama oleh mahkamah, plaintif menuntut terhadap defendan-defendan jumlah yang terhutang di bawah pinjaman berjangka dan pinjaman tetap,, masing-masing, selepas harta-harta yang menjamin kedua-dua kemudahan dijual berbangkit daripada kegagalan defendan-defendan untuk membuat bayaran ansuran seperti yang dipersetujui. Defendan-defendan membuat tuntutan balas dalam kedua-dua guaman bagi ganti rugi untuk penjualan harta-harta secara salah dan tidak sah dan memohon untuk pulangan nilai anggaran harta-harta. Jualan lelong dalam guaman 2008 membawa kepada lebihan sebanyak RM22,652.20 berbanding jumlah terhutang kepada plaintif. Plaintif tidak mengkredit jumlah tersebut ke dalam akaun defendan-defendan tetapi telah menyimpannya dalam akaun penggantungan disebabkan percanggahan defendan terhadap kemudahan pinjaman tetap. Defendan-defendan mendakwa plaintif telah, melalui surat tawaran penyelesaian yang diubah bertarikh 5 Disember 2006, menggabungkan kedua-dua pinjaman berjangka dan tetap dan menggantikan atau mengubah terma-terma dan syarat-syarat perjanjian kemudahan yang asal. Plaintif menafikan ia adalah sedemikian dan mengatakan penggabungan tanpa prejudis kedua-dua kemudahan tersebut adalah untuk mempermudahkan defendan-defendan untuk menyelesaikan hutang mereka dan bahawa telah dijelaskan kepada defendan-defendan bahawa sekiranya mereka bercanggah dengan skim gabungan tersebut, plaintif berhak untuk melaksanakan hak-hak dan remedi sepenuhnya di bawah perjanjian asal yang mana mengikat setiap kemudahan tersebut.

Diputuskan, memberikan penghakiman dengan kos dalam guaman 2011 dan menolak tuntutan balas dalam kedua-dua guaman dengan kos:

(1) Telah jelas dinyatakan kepada defendan-defendan bahawa sekiranya mereka tidak membuat bayaran ansuran yang telah diubah pada tarikh yang diubah, plaintif akan kembali untuk menguatkuasakan hak sepenuhnya di bawah perjanjian asal dan surat tawaran (lihat perenggan 14).

(2) Adalah jelas defendan-defendan sedar tentang lelongan awam harta Rawang (yang menjamin pinjaman tetap) dan bahawa jualan telah disempurnakan sebelum cadangan penyelesaian bertarikh 5 Disember 2006. Dalam apa-apa keadaan, melalui klausa perjanjian pinjaman bersama dengan serahhak, tidak terdapat keperluan untuk defendan-defendan diberitahu tentang lelongan (lihat perenggan 21–22).

(3) Meskipun notis tidak disampaikan dengan formal, ia tidak memudaratkan. Di bawah klausa-klausa 13 dan 14(b) perjanjian pinjaman bersama dengan serahhak, setelah percanggahan defendan-defendan, keseluruhan jumlah pinjaman dan faedah serta-merta menjadi terhutang dan harus dibayar dan plaintif mempunyai hak dan kuasa untuk menjual dan menyerahhakkan harta sebagai pemilik tanpa sekatan mutlak (lihat perenggan 26).

(4) Defendan-defendan telah dihalang daripada membangkitkan kesahan lelongan harta Selayang memandangkan mereka tidak mengambil sebarang tindakan untuk mencabar keputusan pentadbir tanah dalam cara yang diperuntukkan oleh s 418 Kanun Tanah Negara (lihat perenggan 37–38).

(5) Dalam ketiadaan sebarang kesilapan jelas yang telah ditunjukkan, defendan-defendan adalah terikat oleh perakuan hutang plaintif dalam eksh P15 (lihat perenggan 37).]

Notes:

For a case on sale of securities of advances, see 1(2) *Mallal's Digest* (4th Ed, 2010 Reissue) para 2648.

Cases referred to

Bangkok Bank Bhd v Chuan Kee Co Sdn Bhd [2000] 2 MLJ 113, HC (refd)

Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685, FC (refd)

Citibank NA v Ibrahim bin Othman [1994] 1 MLJ 608, HC (refd)

OCBC Bank (M) Bhd v CTK Enterprise Sdn Bhd [2000] 6 MLJ 372, HC (refd)

RHB Bank Bhd v Tan Swee Long Holdings Sdn Bhd & Ors [2008] 3 MLJ 130, HC (refd)

Legislation referred to

National Land Code s 418
Evidence Act 1950 s 90A

TJ Lee (Ang Soon Roy with him) (Zairina Loh & Wong) for the plaintiff.
Lim Seng @ Lam Ngan (acting in person) for the defendants.

Lee Swee Seng JC:

PROLOGUE

[1] Here is a case where when the plaintiff bank sued the defendants borrowers for the amount outstanding after their respective properties have been auctioned off for default in the instalment payments, the borrowers counterclaimed against the bank for wrongful and invalid sale of the properties and for the return of the estimated value of the properties besides damages to be assessed.

PARTIES

[2] By an order of court in Kuala Lumpur High Court dated 3 September 1999, all the assets and liabilities of BBMB Kewangan Bhd were vested in Bank of Commerce (M) Bhd. Bank of Commerce (M) Bhd later changed its name to Bumiputra-Commerce Bank Bhd on 30 September 1999. Bumiputra-Commerce Bank Bhd later changed its name to the plaintiff that is CIMB Bank Bhd on 7 September 2006.

[3] BBMB Kewangan Bhd extended a term loan to the defendants on 15 July 1997 under a loan agreement for the sum of RM480,000 subject to the terms and conditions therein. The said loan (the Selayang loan) was secured over a legal charge created over a three storey shop office in Selayang in favour of the BBMB Kewangan Bhd and as a result of the defendants' default the said property was auctioned at the Gombak Land Office on 31 December 2009 for RM810,000. The auction price was more than enough to cover the amount outstanding and indeed left a surplus of RM22,650.20 which the court at the end of the trial in the 2008 Suit ordered the said sum together with interest at the rate of 4%pa to be paid to the defendants from 23 April 2010 to date of realisation.

[4] The defendants also obtained a fixed loan of RM315,900 (the Rawang loan) from BBMB Kewangan Bhd and this time secured by an loan agreement cum assignment dated 14 May 1997 of a piece of property which is a bungalow land in Rawang in favour of BBMB Kewangan Bhd as the individual title to the property has not been issued yet. The Rawang property was sold at a public

auction on 29 October 2005 for RM310,000 as a result of the dedendants' default in the loan.

PROBLEM

[5] Clause 15 of the Rawang loan agreement cum assignment provided that if there is a shortfall after the auction of the property, the defendants shall pay to the plaintiff the shortfall together with the prescribed interest.

[6] The plaintiff claimed in the 2011 Suit for the shortfall of RM285,605.80 together with interest and cost.

[7] The defendants alleged in their defence and counterclaim filed in both the 2008 and 2011 Suits that both the term loan facility and the fixed loan facility had been consolidated to a combined sum of RM620,000 only vide the plaintiff's letter dated 5 December 2006. The plaintiff contended that the plaintiff's letter of 5 December 2006 is a settlement offered to the defendants on a strictly without prejudice basis to enable the defendants to settle their debts under both the term loan (Selayang loan) and the fixed loan (Rawang loan) at the sum of RM620,000 but that the defendants had failed to keep up with the repayments as provided in the said letter.

[8] As the defendants had breached the terms and conditions of the said letter the plaintiff was therefore entitled to revert to its full rights and remedies under the loan agreement and the loan agreement cum assignment between the parties.

PRAYER

[9] Whilst the plaintiff claimed for the amount outstanding under the term loan in suit 2008 and under the fixed loan in suit 2011, the defendants filed their counterclaims in both suits. In the 2008 suit the defendants prayed for a declaration that the auction of the Selayang property was wrongful and invalid and/or that the Selayang property be returned to the defendants. They also prayed for loss of the Selayang property which is estimated at RM1,2000,000 and/or the loss of use of the Selayang property estimated at RM300 per day from the date of auction and continuing besides general damages to be assessed with interest and costs.

[10] The defendants' counterclaim in the 2011 suit was that they were not notified of the public auction of the Rawang property and so they prayed for a declaration that the auction of the Rawang property wrongful and invalid and an order for the Rawang property to be returned to the defendants. The defendants also prayed for loss of the Rawang property estimated at

RM600,000 and/or loss of daily use of the said property estimated at RM200 per day from the date of auction to realisation besides damages to be assessed, interest and costs.

PAROL AND PAPER EVIDENCE

Whether the plaintiff was entitled to enforce its rights under the original loan agreement and loan agreement cum assignment if the settlement terms were not fulfilled by the defendants

[11] The then assistant vice president of the plaintiff, Miss Marlina Ling Hie gave evidence on behalf of the plaintiff as PW1. She testified that the plaintiff had by its letter dated 6 November 2006 (exh P16) at pp 203–204 of bundle D (plaintiff's bundle of documents) offered the defendants a settlement on a strictly without prejudice basis and subject to the terms and conditions therein. The whole of the said letter from the plaintiff to the defendants is reproduced below for an appreciation of the full terms and conditions:

Our Ref: GSR/MLH/ZMA/14140020049957 & 14140020232952

Date: 6 November 2006

-WITHOUT PREJUDICE-

Lim Seng @ Lam Ngan

Lim Yin Hee

Lim Yong Piao

No. 37Jalan2/16

Bandar Baru Selayang

68100 Batu Caves

Selangor

Dear Sirs

Re:	Account No:	1) 14140020409957-RM204.401.96 @ 31.10.2006
		2) 14140020232952 - RM576.823.89 @ 31.10.2006
	Borrower(s):	1) Lim Seng @ Lam Ngan
		2) Lim Yin Hee
		3) Lim Yong Piao
Rescheduling of Payment		

We refer to our discussion and your proposal dated 2.11.2006.

After due consideration, we are pleased to inform that our Management has approved the new arrangement subject to the following terms and conditions:

(1) To reschedule both the accounts to RM620,000.00 with interest under the original Letter of Offer and Facility Agreement executed by you;

(2) To forward lump sum payment of RM20,000.00 on or before 31.1.2007;

(3) The new monthly instalment amount is RM8,000.00 per month commencing on 30.11.2006 until loan settlement;

(4) All monthly instalments shall be made on or before 30th without any prior demand to you;

(5) In the event you default any of the above terms and conditions, you shall be deemed to have revoked this new arrangement and we shall instruct our solicitors to proceed to enforce our rights pursuant to the original Facility Agreement;

(6) Notwithstanding the above, you hereby agree and understand that this new arrangement shall not be in substitution and/or variation of the terms and conditions in the original Facility Agreement.

The above indulgence is strictly on a without prejudices basis to all our rights and entitlements under the Letter of Offer and executed by you.

Kindly acknowledge acceptance of the above terms and conditions herein by signing and returning the enclosed duplicate letter within 7 days from the days hereof failing which this offer shall be deemed to be (sic) lapsed.

Yours faithfully,

for CIMB BANK BERHAD (13491-P)

(Formerly known as Bumiputra-Commerce Bank Berhad)

Group Special Recovery

sgd

…

Zabidi Mohamed Akib

Recovery Officer

sgd

…

Marlina Ling

Assistant Vice President

ACCEPTANCE OF RESCHEDULING OF PAYMENT

We, hereby unequivocally and unconditionally accept all the above terms and conditions.

…

Name: Lim Seng @ Lam Ngan

NRIC No:

Date:

…

Name: Lim Yin Hee

NRIC No:

Date:

…

Name: Lim Yong Piao

NRIC No:

Date:

[12] The above letter of 6 November 2011 was accepted with some modifications by the defendants on the plaintiff's revised offer letter of settlement dated 5 December 2006 duly accepted by the defendants. The said letter marked as exh P17 at pp 205–206 of bundle D is reproduced below for an appreciation of its full terms and conditions:

Our Ref: GSR/CONS/527/14140020049957 & 14140020232952

Date: 05.12. 2006

Lim Seng @ Lam Ngan Lim

Yin Hee Lim

Yong Piao

No. 37 Jalan 2/16

Bandar Baru Selayang

68100 Batu Caves

Selangor

'WITHOUT PREJUDICE'

Dear Sirs

Re:	Account No:	1) 14140020409957 - RM204.401.96 @ 31.10.2006
		2) 14140020232952 - RM576.823.89 @ 31.10.2006
	Borrower(s):	1) Lim Seng @ Lam Ngan
		2) Lim Yin Hee
		3) Lim Yong Piao

Rescheduling of Payment

We refer to and your letter dated 22.1.2006

After due consideration, we are pleased to inform that our Management has approved/reviewed the new arrangement subject to the following terms and conditions:

(1) To reschedule both the accounts to RM620,000.00 and to waive the interest before 28.02.07.

(2) To extend the commencement date to 28.02.07 for the upfront payment of RM20,000.00 together with the new monthly instalment of RM8,000.00 until full settlement of the accounts.

(3) To pay RM4,000.00 in December 2006 and January 2007.

(4) All the terms and conditions except para 1,3,4,5 & 6 of our convey letter dated 06.11.06 remain unchanged.

The above indulgence is strictly on a without prejudice basis to all our rights and entitlements under the Letter of Offer and executed by you.

Kindly acknowledge acceptance of the above terms and conditions herein by signing and returning the enclosed duplicate letter within 7 days from the days hereof failing which this offer shall be deemed to be lapsed.

Yours faithfully,

for **CIMB BANK BERHAD (13491-P**)

(Formerly known as Bumiputra-Commerce Bank Berhad)

Group Special Recovery

sgd

…

Zabidi Mohamed Akib

Recovery Officer

sgd

…

Marlina Ling

Assistant Vice President

ACCEPTANCE OF RESCHEDULING OF PAYMENT

We, hereby unequivocally and unconditionally accept all the above terms and conditions.

sgd

…

Name: Lim Seng @ Lam Ngan

NRIC No: 421101-08-5089

Date: 12/12/2006

sgd

…

Name: Lim Yin Hee

NRIC No: 750813-08-6255

Date: 12.12.06

sgd

…

Name: Lim Yong Piao

NRIC No: 710226 08 6115

Date: 12/12/2006

[13] I can accept the explanation of PW1 that there has been a typographical error in that to make sense of para 4) of the letter of 5 December 2006 it should read as follows:

> 4) All other terms and conditions *at* para 1,3,4,5 & 6 of our convey letter dated 06.11.06 remain unchanged.

[14] I am left in no doubt that none of the defendants were misled or prejudiced in any way as the only witness for the defendants ie the first defendant did not say how he had been misled. All he stated was that the plaintiff cannot have the best of both worlds and have the cake as well as eat it. By that he meant that if the plaintiff had agreed to grant a hair-cut to the defendants, then the plaintiff cannot revert back to the original terms in the loan agreement and the loan agreement cum assignment. Whether or not the plaintiff can revert back to the original terms in the loan agreement and loan agreement cum assignment depends on the terms and conditions agreed upon. Here I agreed that PW1 has made it amply clear to the defendants that if they do not make the revised instalment payments on the revised dates due, the plaintiff shall revert to enforce its full rights under the original agreements and the letter of offer. There is nothing unusual with such a clause. The defendants failed to make the revised instalment payments and so the plaintiff proceeded with its full rights under the letter of offer as well as the original loan agreement

and loan agreement cum assignment.

Whether the defendants have been duly notified of the public auction sale of the Rawang property.

[15] One Rozilah bt Ibrahim who was the assistant vice president of the plaintiff gave evidence as PW2. She had personal knowledge of the recovery of the loan facilities granted to the defendants. She gave evidence that on 17 October 2005 the first defendant had come to see her and that she had informed him that his proposal for settlement had been rejected by the plaintiff. She said that on the same day she handed the first defendant a copy of the auction catalogue wherein the Rawang property had been listed for auction on 29 October 2005. The auction catalogue is marked as exh P22 at pp 1–3 of bundle E.

[16] Even in the first defendant's own letter undated but received by the plaintiff on 28 October 2005 he referred to the fact that:

> Twice the time, I also sent letter for the purpose waiting for your reply until 26-10-2006 9.30am. I refer to the two copies of documents from Rozilah Binti Ibrahim (Pengurus) among one copy is ref no. 27831510/mr. The other one is the catalogue of auction on 29-10-2005.

[17] Therefore it can be clearly seen from the first defendant's own letter there is already an admission to the fact that he had received the notice of the auction to be held on 29 October 2005.

[18] PW2 also produced in court a letter from the plaintiff to the first defendant dated 14 October 2005 marked as exh P24 stating as follows:

> Please be informed that the request has been rejected and the Bank has decided as follows:
>
> (a) To remain as per earlier decision dated 09/08/05.
>
> (i) To pay RM80,000-00 by 24/10/05.
>
> (ii) Thereafter to continue RM6,000-00 per month until full settlement of the arrears.
>
> (b) Payments are received on 'Without Prejudice Basis'.
>
> (c) Failing which to proceed with auction on 29/10/05 without any further notice …

[19] The said letter had been signed by PW2.

[20] There was also the corroborative evidence of the reply of the plaintiff's then solicitors Raslan Loong to the first defendant dated 22 November 2005 which dealt with the same complaint by the first defendant. The said letter is marked exh P18 and it is important enough to be reproduced below as it dispels the notion of the defendants that they were not aware at all about the auction of the Rawang property:

> We note your grievance in regards to the sale of the abovementioned Property via auction on 29.10.2005.
>
> Your allegation that you were not notified of the auction is unfounded and misconceived. By a Notice of Demand and Notice to Deliver Vacant Possession dated 23.9.2005, you have been put on notice that if you failed to satisfy the sum of RM472,195.97 as at 23.9.2005 within fourteen (14) days from the date of the letter, you were to deliver vacant possession of the Property to our client, failing which our client would proceed to foreclose your property without further reference to you.
>
> Upon receipt of our Notice of Demand and Notice to Deliver Vacant Possession dated 23.9.2005, our client received a proposal by you on 11.10.2005 wherein you proposed that you will repay the outstanding amount by way of instalments of RM3,000.00 per month starting October 2005. Our client rejected this proposal and stated that it was prepared to settle this matter on the following terms:
>
> (a) To pay RM80,000.00 by 24.10.2005 and thereafter to continue payment of RM6,000.00 per month until full settlement of the arrears;
>
> (b) Payments were to be made on a "Without Prejudice" basis; and
>
> (c) Failing which, our client would proceed with the auction on 29.10.2005 without any further notice to you.
>
> You the met with Puan Rozilah, the Centre Manager on 17.10.2005, who informed you that your proposal had been rejected by the bank and the bank would proceed to auction on 29.10.2005; a copy of the auction catalogue was also handed to you on the same day. Subsequently the bank also informed you in writing via a letter dates 24.10.2005 that your proposal had been rejected.
>
> Therefore, you had been given due notice that the Property would be put up for auction on 29.10.2005 and your allegations of 'cheating' or 'deception" are totally unfounded …
>
> In conclusion, you had, at all material times, knowledge that the Property was to be auctioned on 29.10.2005. You had been given due notice of the auction, and the auction was carried out with due compliance of procedure and there is neither 'deceit' nor 'deception' on either the part of our client or its lawyers.

[21] In any event under the loan agreement cum assignment by cl 14 thereof there is no requirement that the borrowers must be notified of the auction for the cl at (b) reads:

> Upon default by the Borrower(s) in the manner in Clause 13 hereinbefore provided the Lender shall be entitled to exercise all or any of the rights and powers following:
> …
>
> (b) the right and power to sell and assign the said Property as the absolute unencumbered owner thereof at such price or prices and in such manner as the Lender shall in its absolute discretion think fit.

[22] The defendants also contended that they were unaware of the fact that the Rawang property had been sold by public auction when they signed the settlement letter of 5 December 2006 on 12 December 2006. In fact the first defendant went so far as saying that PW1 represented to him on the meeting on 12 December 2006 that at that time the Rawang property had not been auctioned yet. This is not credible not just because of the reply by Raslan Loong dated 29 June 2006 exh P18 but also because of Raslan Loong's reply to the defendants' solicitors Messrs Shamsuddin & Co letter dated 23 March 2006 alleging that the plaintiff had failed to provide proof of proper service of legal notice prior to the public auction on 29 October 2005. The said letter from Messrs Shamsuddin & Co is marked as exh P21 at pp 199–200 of bundle D and Raslan Loong's reply of 29 June 2006 is at pp 201–202 of bundle D. The knowledge of the solicitors is knowledge of the clients as well. I agree with PW1 that as such, it was very obvious that the defendants were aware that the public auction had been carried out and that the Rawang property had long been sold and its sale completed before the settlement proposal dated 5 December 2006.

[23] In any event the caption to the settlement letter referred to the amount outstanding under the fixed loan (Rawang property) as RM204,401.96 as at October 2006 which is much less than the amount outstanding of RM472,196.97 as at 23 September 2005 as stated in exh P18, being letter from Raslan Loong to the first defendant dated 22 November 2005. Surely the first defendant would have been aware if he had made any payments towards reduction of the loan. The reduced figure can only be arising out of the shortfall after taking into consideration the sale proceeds received from the successful auction of the Rawang property.

[24] There was also another piece of evidence from the first defendant himself which destroyed his credibility totally where his assertion is concerned that he was not aware on 12 December 2006 that the Rawang property had not been auctioned off. The first defendant had written to Diamond Realty vide his letter of 17 March 2005 (exh P19 at p 197 of D) which was erroneously dated as such when it should have been correctly dated 17 March 2006 as the said letter was received by the auctioneer on 22 March 2006 alleging that he had never authorised the said agent to sell the Rawang property. The agent Diamond Realty replied by their letter of 22 March 2006 that they had been

duly appointed by Bumiputra Commerce Bank Bhd to seek bidders for the Rawang property (exh P20 at p 198 of D).

[25] The first defendant must have been labouring under some serious misapprehension as to what had happened for he had asserted that the plaintiff had committed a criminal breach of trust by auctioning off the Rawang property and had proceeded to lodge a police report against the plaintiff to this effect on 6 August 2011. Needless to say this was not the only police report lodged against the plaintiff by the first defendant.

[26] The first defendant argued that even if he had received notice of the auction, his two children the second and third defendants had not received the notice. However the only person who testified for the defendant was the first defendant alone. The second and third defendants have stayed away and they had not come to testify that they had not received notice of the intended auction. In any event as I have held, notice even if it had not been served formally is not fatal as provided under cll 13 and 14(b) of the loan agreement cum assignment (exh P3 pp 141–178 of D). Clause 13 stipulated that upon default by the defendants, the whole of the principal amount of the loan and interest thereon shall become due and immediately repayable and the plaintiff as the lender shall forthwith become entitled to exercise the rights and powers upon default without any notice. Clause 14 provides that the plaintiff has the right and power to sell and assign the assigned property as the absolute unencumbered owner at such price as the plaintiff deems fit.

[27] At any rate the first defendant had been dealing with the plaintiff not only on his own behalf but also on behalf of the second and third defendants who are his children and his knowledge of the notice of auction is their knowledge as well.

Whether the plaintiff has proved on a balance of probabilities the amount outstanding

[28] The plaintiff had claimed that under the term loan (Selayang loan) there was the sum of RM661,023.15 outstanding as at 27 June 2008 together with interest at the rate of 0.75%pa above base lending rate (that is 6.75% on 27 June 2008) on monthly rests until full payment. A detailed statement of account (exh P13 at p 55 of D) and a certificate under s 90A of the Evidence Act 1950 (exh P14 at p 56 of D) were tendered in court to prove the amount outstanding in the 2008 suit. Furthermore cl 39 of the annexure to the charge provides that the chargor(s) hereby agree(s) that a statement of account of the chargor(s) signed by the general manager, deputy manager, assistant manager, submanager, accountant, senior credit officer or any other authorised officer of the chargee shall be conclusive proof of the indebtedness of the chargor(s).

[29] His Lordship Mahadev Shankar J (as he then was) in *Citibank NA v Ibrahim bin Othman* [1994] 1 MLJ 608 at p 615 observed:

> … A bare denial of a debt was never enough. The chargor also has an onus if the denies the amount claimed to say how much he admits owing …

[30] In a similar vein His Lordship Kamalanathan Ratnam J, in *Bangkok Bank Bhd v Chuan Kee Co Sdn Bhd* [2000] 2 MLJ 113 at p 114 said:

> (3) The plaintiff had clearly given the details of the amount claimed as set out in the affidavit in support of the application and in the further affidavit. The defendant did not give any particular sum it was challenging nor did the defendant give any evidence whatsoever that the sums claimed by the plaintiff were wrong in any material particular …
>
> (5) What is important is that there was no evidence to show that the amount claimed was incorrect. Based on authority, the court accepted the plaintiff's reliance upon the conclusive evidence clause.

[31] His Lordship PS Gill J, (as he then was) in *OCBC Bank (M) Bhd v CTK Enterprise Sdn Bhd* [2000] 6 MLJ 372 at p 373 also expressed the same approach towards assessing evidence of the amount outstanding as asserted by the plaintiff bank in the light of a bare denial by the borrower:

> (3) It is permissible for more than one affidavit to be filed in this type of case because invariably the matter could not be disposed of on the first return date. Provided evidence of the correct amount due has been put before the hearing date, the court had the power to dispense some omission to fulfil the rules to the letter, but only if no real prejudice would result to the defendant. The defendant's affidavit in reply which contained a general denial of the amount owing was not enough to raise a cause to the contrary. As the defendant denied the amount claimed, they had an onus to say how much they admitted owing. On the facts, the affidavit of the defendant did not condescend to such particulars …

[32] His Lordship Mohd Sofian JC (as he then was) in *RHB Bank Bhd v Tan Swee Long Holdings Sdn Bhd & Ors* [2008] 3 MLJ 130 had this comment to make on the effect of a certificate of indebtedness:

> (3) Further, the certificate of indebtedness, after being examined in accordance with the loan and guarantee agreements respectively, were clear enough. There was nothing to suggest any manifest error on the face of the certificate nor was any fraud shown. In the circumstances, the certificate of indebtedness was conclusive proof of the debt and liability of the defendants …

[33] Finally the Federal Court speaking authoritatively through His

Lordship Steve Shim CJ of Sabah and Sarawak in *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685 at p 686 observed:

> (3) A certificate of indebtedness operates in the field of adjectival law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disprove the amount claim …
>
> (4) There was nothing to indicate or suggest any manifest error on the face of the said certificate nor was any fraud shown. In the circumstances and given the authorities cited, the answer to the first question must be in the affirmative whereas the second question had to be answered in the negative …

[34] By the same token the shortfall sum of RM285,605.80 as at 17 February 2011 together with interest at the rate of 0.75%pa above base lending rate (that is 6.30% on 17 February 2011) on monthly rests until full payment in accordance with cl 15 of the loan agreement cum assignment has also been proved through a certificate of indebtedness prepared by PW1 and tendered and marked as exh P15 at p 207 of D. Clause 35 of the loan agreement cum assignment speaks of the final and conclusive effect of such a certificate of indebtedness. PW1 had further testified that the amount stated is the amount due and owing after the plaintiff had taken into consideration the proceeds from the successful auction of the Rawang property on 29 October 2005. I agree with learned counsel for the plaintiff that in the absence of any manifest error being shown by the defendants the defendants are bound by the cetificate of indebtedness in exh P15.

Whether the public auction under the National Land Code of the Selayang property had been properly carried out

[35] The defendants had made the following allegations which were not supported at the trial. First that the charge document for the Selayang property was incomplete and is a false document. Second the land administrator of the Gombak Land Office was biased in favour of the plaintiff.

[36] With respect to the allegation of incomplete charge document by the defendants, PW1 had testified that the charge document marked as exh P26 (which is identical to exh P4, except for p 14 in exh P4 which was accidentally printed on the plaintiff's letterhead) was a complete document. The defendants' scurrilous and spurious allegation that the charge document is incomplete and is a false document is totally devoid of any merits.

[37] As for the defendants' allegation that the land administrator was biased in favour of the plaintiff, the first defendant admitted during cross-examination that there is nothing before the court to prove that the said land administrator was biased. The defendants have not filed any action to

dispute the validity of the auction of the Selayang property. The relevant provision applicable to any challenge against the decision of the land administrator must surely be governed by s 418 of the National Land Code which reads:

> 418 Appeals to the Court
>
> (1) Any person or body aggrieved by any decision under this Act of the State Director, the Registrar or any Land Administrator may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the Court.

[38] The defendants have not complied with the procedure for appeal and are barred from raising the validity of the auction of the Selayang property in this court.

PRONOUNCEMENT

[39] Based on the reasons given above I gave judgment for the plaintiff for the sum of RM285,605.80 as at 17 February 2011 together with interest at 0.75%pa above base lending rate (that is 6.30% on 17 February 2011) on monthly rests until full payment for the 2011 Suit.

[40] As for the 2008 Suit evidence was led that the Selayang property has subsequently been sold and there had been a surplus of RM22,650.20 which sum I ordered to be paid out to the defendants with interest at 4%pa from 23 April 2010 as per the plaintiff's statement dated 8 August 2011 showing the detailed calculation as at 23 April 2010 marked as exh P25. The said sum had earlier been kept in a suspense account and had not been credited to the defendants then as they had defaulted in the Rawang loan.

[41] I also ordered costs to be paid by the defendants to the plaintiff for the plaintiff's claim.

[42] Based on the reasons given above I also dismissed both the counterclaims of the defendants in 2008 suit and 2011 suit with costs.

Judgement granted with cost in the 2001 Suit and counter claims in both suits dismissed with costs.

Reported by Ashok Kumar